CONTRACT - any [illegible] fraud?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 450

T. A. GARRETT and ELIZABETH GARRETT,

PETITIONERS,

—v.—

JOHN C. FAUST and CORA FAUST,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

T. A. GARRETT and ELIZABETH GARRETT,
Petitioners,

—v.—

JOHN C. FAUST and CORA FAUST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Basis of Jurisdiction

The printed Opinion of the Court of Appeals is to be found in the Proceedings in the United States Court of Appeals for the Third Circuit on pages dated August 1st, 1950. For brevity's sake it is not repeated here. It is also reported in Volume 183 Fed. at page 625.

Petitioners pray that a writ of certiorari issued to the Court of Appeals for the Third Circuit for the purpose of setting aside its judgment and opinion on August 1, 1950 in so far as it covers the following portion of said judgment and opinion:

> "On consideration whereof it is now here ordered and adjudged by this court that the judgment of the

said District Court in favor of the plaintiff be and the same is hereby vacated, with costs * * *."

The foregoing is a violation of the Seventh Amendment of the Constitution of the United States which says

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Petitioners filed a motion for a rehearing but that was denied on September 14, 1950 without filing an opinion.

This is a case involving a contract between the parties entered into by and between petitioners and respondents. Petitioners brought suit to recover damages against the respondents for having unlawfully cancelled the contract by misrepresentation. The petitioners are T. A. Garrett and his wife, Elizabeth Garrett. They reside at Richland Springs, Texas and are engaged in raising turkeys and particularly in producing turkey eggs to be sold to the turkey hatcheries. John C. Faust and his wife, Cora Faust, are the respondents. They own the Ephrata Hatchery at Ephrata, Pennsylvania. They are engaged in the business of hatching turkey eggs and selling the young turkeys called poults in many states.

On or about August 30, 1945, by letter, petitioners and respondents entered into a contract whereby the respondents agreed to purchase from the petitioners all the turkey eggs which petitioners could produce on their turkey farm for the 1945-1946 turkey season which begins about the 15th of December and ends the latter part of the following

June (p. 2 of Court of Appeals opinion). The letter contract entered into on or about August 30, 1945 contained the schedule of prices. Petitioners fully prepared themselves to carry out the said contract and shipped turkey eggs to the respondents until on or about February 21, 1946 when the respondents, by misrepresentations in a telegram and letters attempted to cancel the contract made between the parties, resulting in great damage to petitioners.

Petitioners filed suit in the United States District Court at Philadelphia, Pennsylvania for damages in the sum of $36,000.00. A jury being demanded, the case was tried before one. The jury found that the contract was breached by the respondents on the question of misrepresentations made by them and awarded petitioners a verdict of $17,000-.00. This finding is amply supported by much substantial uncontradicted evidence. Thus, by virtue of the Seventh Amendment of the Constitution of the United States, that portion of said judgment in this case which violates the Seventh Amendment is null and void.

Questions Presented

1. Did the Court of Appeals in its judgment, as described by it in its opinion of August 1, 1950 and its denial of petitioners' Motion for a Rehearing, violate the Seventh Amendment of the Constitution of the United States which says

> "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

2. Is the case at bar a "suit at common law, where the value in controversy shall exceed twenty dollars"?

Summary Statement

The following is the letter written by John C. Faust on August 30, 1945 to T. A. Garrett. Exhibit B, Appendix for Appellants, 15a.

"August 30, 1945

Garrett Turkey Farm,
Richland Springs, Texas

Dear Sir:

We are writing to inquire if you are again able to furnish us with eggs for hatching for the coming season. We can use all your eggs from December 15th on. All breeders must be blood tested, the tube test. I would like to have one clean test, which I will pay for when you make your last shipment of eggs.

The eggs are to be tested for cracks by the bell test. This is done by tapping the eggs together lightly, which will take very little time.

All eggs must be packed well with some kind of packing around the eggs; at least, around the outside of the rows to keep them from slipping around. Be sure that all cases are in good condition before using. If the sides or bottoms are loose, renail them. We will see that they are O. K. when they leave here. We will pay the express charges to have the cases of eggs shipped to us and ask you to pay the charges for the return of the empty cases.

Under present conditions we will pay the same price as last year, which is as follows:

Shipments to May 1st—30¢—80% fertility guaranteed.

May 1st to May 30th—25¢—75% fertility guaranteed.

Balance of season—20¢—70% fertility guaranteed.

There will be no change in the price of eggs *unless we are compelled to sell our poults for less than 60¢,* or any change due to conditions beyond our control.

We are in need of Bourbon Red, White Holland, Narragansett and Black Spanish eggs. Please let us know if we can depend on your eggs for the coming season.

Yours very truly,

Ephrata Hatcheries,
John C. Faust, Manager."

When petitioners shipped eggs to respondents and they were broken en route respondents, in remitting to petitioners, deducted the selling price of each broken egg. Then respondents filed a claim against the Railway Express Agency, pages 49a to 53a, Appendix for Appellants. These were paid for by the Express Agency. This collecting for the same cracked eggs from both the Garretts and the Railway Express Agency could not have been a mistake or an accident. If the Fausts did not know of it at the time the duplication occurred, if they were honest, when they learned of the mistake there would have been not only an immediate apology but the money would have been returned to either the Express Agency or to the Garretts.

Upon the order of the District Court, the three original books of account were photostated. Exhibit 9, Egg Purchase Order Book, Exhibits 10 and 11, books showing poults sold by respondents and to whom.)

All that the Court of Appeals saw, according to its opinion, was a number of cancellations of poult purchases. No mention is made of the sale by the Fausts of 411,152 poults at an average price during the whole season of 70¢ per poult or a total of $287,706.40 gross. Attention is called to the letter contract which says "There will be no change in the price of eggs unless we are compelled to sell our poults for *less than 60¢* or any change due to conditions beyond our control." Appendix for Appellants, page 15a

The Conflict of Facts in This Case Is Not Altogether Between Petitioners and Respondents But Between Respondents and Their Three Books of Account

Faust, on February 21, 1946, sent a telegram to the Garretts in which he stated "Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. Stop all egg shipments at once." That is a false statement definitely made to misrepresent and defraud the Garretts, as will be shown by the following and particularly by the books of account of the Fausts.

"Dear Sir:

> Our wire to you stated reason for stopping egg shipments. It is with greatest regret that I am stopping egg shipments, but under the circumstances, it is all I can do. I have over 60,000 poults for sale March 4th, 11th, and 18th. As I stated, if you could use poults now, I would take one egg for each 2 poults sold. Prices are 60¢ f.o.b. hatchery, shipped by Air Express.
>
> • • • • •
>
> Under our contract you may be able to make me take the eggs, but you will also note that I can reduce

the price as low as I wish. As this is one condition I have no control over. If you insist that I take the eggs, I could not pay over 2¢ each f.o.b. your station for all eggs shipped from date of wire on. Again, let me say, I am very sorry, but I will lose over $30,000 if these poults do not move.

Yours sincerely

John C. Faust"

45a

The fact of it is, as Faust's books of account so definitely show, that on the 21st day of February, 1946, when he sent out his calamitous telegram stopping the shipping of any more eggs, he was taking on new sellers almost every day. The number of eggs which the Fausts purchased during the turkey year of 1945-46 was 783,162. The number of poults sold was 411,152. His income from the sale of poults that year was $287,806.40. The average price of poults for 1945 and '46 was 70¢, 10¢ more than the limit set before the price of eggs could be changed.

The books of account are in the record and everything in them must be taken into consideration. The Honorable Court of Appeals may have misinterpreted the word "out" in plaintiffs' exhibits 10 and 11, which contain Faust's record of poult sales, which does not mean cancellation, as Faust instructed counsel for plaintiffs when he made his inspection, but means "shipped out." If "out" meant cancelled, then it would appear that practically all the ~~egg~~ poult orders were canceled.

The first hatch, the date of which is not given in the book of account, is entitled "First Hatch". A record was made after each hatch. The succeeding ones are entitled by the date in which each hatch was completed. There was only

one cancellation in the first hatch. Cancellations are marked with the word "Cancelled". The word "Out" means that the eggs had been hatched and the poults sent out to the purchasers.

In the second hatch on January 21 there were no cancellations. The next hatch was on January 28. There were no cancellations. On the next, February 4, there was one cancellation of Vernon C. Hoof. This is marked both "Cancelled" and "Out" and also "Paid" and "Refunded" and so it is difficult to decide just what that is. Taking the rest of the hatches in their order, February 11 there were two cancellations, February 18 one, February 25 three, March 4 two, March 11 none, March 18 one, March 25 four, April 1 six, April 29 fifteen, May 6 five, May 13 eight, May 20 eight, May 27 nine, June 3 nine, June 10 nine, June 17 twelve, June 24 eight, July 8 four, July 15 one. It will be noticed that there were very few cancellations before February 21, 1946.

The books of account being in evidence, the addendums, tabulations attached to reply brief filed by plaintiffs in Court of Appeals, have not been denied by any legal evidence. There was no attempt to disqualify the calculations made by plaintiffs' counsel and which are in evidence. Certainly those records create a jury issue between Fausts' statements in their letters and telegram and their books of account. Therefore the Court erred in setting aside the judgment of the jury that plaintiffs were damaged in the sum of $13,390.90.

The Court further erred when it believed the two statements of Faust in his letter to the Garretts on February 21, 1946, namely "It is with greatest regret that I am stopping egg shipments but under the circumstances it is all I

can do." This contains misrepresentation of two alleged existing facts which, in fact, did not exist at that time, one that he had to stop egg shipments because there was no market for poults and the other that conditions forced him to do this, implying that there was a panicky existing situation, which was not true. The second sentence in that letter which is also false in that it pictures a complete breakdown in the prices in the turkey business is "If you insist that I take the eggs I could not pay over 2¢ each f.o.b. your station for all eggs shipped from date of wire on." Plaintiffs' Exhibit 9, Fausts' book of account, will show that the price of eggs at that time ranged from 16¢ to 30¢ per egg. These present substantial issues of fact.

Furthermore, the Ephrata Hatchery book of account, Exhibit 9, showing the purchases of eggs made by the Fausts, on page 114, shows the eggs purchased from Clyde Hanson, Creswell, Oregon. The Fausts started buying turkey eggs from him on the first of February, 1946. The following is the list of the eggs purchased from him, giving the dates and the quantity. The total number of purchases was 34,800. Does that show the panicky financial condition described in Faust's telegram and letter of February 21, 1946?

Date	No. Eggs	Date	No. Eggs
2/ 1/46	2000	3/27/46	2000
2/11/46	2800	4/ 8/46	2000
2/14/46	2000	4/ 8/46	2000
2/19/46	2000	4/12/46	2000
2/22/46	1600	4/13/46	2000
2/27/46	2000	4/17/46	2400
3/ 1/46	2000	4/20/46	2400
3/22/46	2000	4/25/46	3600
		Total ..	34,800

(See Motion for Rehearing, page 6)

On page 116 of that same book of account showing the eggs bought by Faust is to be found the account of eggs purchased from C. W. Ward, Weirwood, Virginia in 1946. It will be noticed that the first purchase made from him was on the 8th of March, 1946. The total number of eggs purchased from Mr. Ward was 72,400.

Date	No. Eggs	Date	No. Eggs	Date	No. Eggs
3/ 8/46	400	3/29/46	1200	5/ 9/46	2800
3/ 9/46	400	3/30/46	2400	5/ 9/46	2000
3/12/46	1000	4/ 6/46	7000	5/11/46	2000
3/15/46	800	4/13/46	5000	5/14/46	3400
3/16/46	1400	4/15/46	1200	5/17/46	1200
3/23/46	1000	4/20/46	4400	5/18/46	1000
3/19/46	2600	4/23/46	3600	5/20/46	1200
3/21/46	1000	4/27/46	4200	5/23/46	2400
3/22/46	1200	4/30/46	3200	5/23/46	1400
3/27/46	2200	5/ 2/46	2400	5/29/46	3400
3/28/46	800	5/ 3/46	2200	5/29/46	1000
				Total ..	72,400

(See Motion for Rehearing, page 6)

Do these show conditions beyond Faust's control which compelled him to say "I cannot take any more eggs this season" and justify his cancellation of all the Garrett egg shipments? Was that not a planned and completely carried out misrepresentation purposed to defraud the Garretts? The foregoing is only a fraction of the fraudulent transactions, commencing at least on the 4th day of December, 1945 and continuing throughout the rest of the period of the contract between the Fausts and Garretts.

Clyde Hanson made six sales of turkey eggs to the Ephrata Hatchery in February, 1946, totaling 12,400 eggs and two in March, totaling 4,000. Is there any evidence in those sales that Faust telegraphed him to stop sending eggs? Wasn't it a fraud perpetrated upon the Garretts

to break off their contract and take on a big shipment from Clyde Hanson on the first of February?

Did the jury err when it believed the Fausts' books of account and decided not to believe their letters? What explanation did the Fausts give for not believing their own books of account compiled by themselves? Was the Court of Appeals justified in stating that "the plaintiffs wholly failed to produce evidence that any of the foregoing statements by the Fausts were untrue, let alone fraudulent?"

The Court further said:

> "We have said, the evidence wholly fails to establish either fraudulent misrepresentations by the defendants or a breach of contract by them other than that involved in the failure to pay in full for the eggs actually shipped to them by the plaintiffs."

The total number of eggs sold to defendants was 783,162. The number of poults sold was 411,152. The following is the list of poults sold by the Fausts during the whole 1945-'46 season by months.

Month	No. Poults per Month	Month	No. Poults per Month
December	8,807	April	131,771
January	19,385	May	103,833
February	23,505	June	46,295
March	65,711	July	3,200
		Total	411,152

(See Motion for Rehearing, page 8)

Does that not present a perfect productional curve in seasonal business?

The cancellation of the contract between the Garretts and the Fausts as the Fausts considered it took place on

February 21, 1946. The number of sellers of turkey eggs to the Fausts before February 21 was 46 and the number who sold eggs to the Fausts for the first time on February 21 and thereafter was 56. The total number of eggs which the Fausts bought from those who were selling eggs to them before February 21 was 309,590 and the total number of eggs purchased by the defendants for the first time after February 21 to the end of the season was 473,572. (See Motion for Rehearing, p. 9.)

Thus the Fausts' books of account which they did not dare to introduce to prove their statements made to the Garretts prove that the telegram which Faust sent to the Garretts on February 21 and previous letters written in December and January are intentional flagrant misrepresentations as to existing facts.

It cannot be disputed that the Fausts breached their contract with the Garretts in favor of many other egg producers selling at a lesser price. In the manipulation of this he made false statements, expecting the Garretts to believe him. How can this be anything else but fraud? Thus the Court erred when it overruled the jury's award of $13,390-.90 damages for loss of profits which they would have made if Faust had carried out his part of the contract.

The Garretts live in Texas and the Fausts in Pennsylvania. Could there be a cancellation of a contract of this kind before the Garretts had real knowledge that Faust, when he cancelled the contract by letter and telegram, was buying eggs in Oklahoma, Oregon, and other states? Was not that burden of proof on Mr. Faust?

The Court of Appeals, two or three times in its opinion, said that Mr. Garrett had acquiesced in the cancellation of the contract. It said "The Garretts acquiesced in this ter-

mination of the contract". If that is true then a contract can be cancelled without knowledge. If it cannot be where is there any testimony that they had knowledge? If acquiescence without knowledge is sufficient, then the Court of Appeals decision is in direct conflict with the laws on fraud in Texas, Pennsylvania, and any other state in the Union.

With so much conflicting evidence presenting so many substantial issues the Court erred in setting aside the findings of the jury that the Garretts had been damaged in the sum of $13,390.90.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals in and for the Third Circuit at Philadelphia, Pennsylvania commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case, numbered and entitled on its docket No. 10,128, Civil Action, *T. A. Garrett, et al., Appellees* v. *John C. Faust, et al., Appellants,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment of the Court of Appeals be dismissed for want of jurisdiction and for such further relief as to this Court may seem proper.

Dated this day of December, 1950.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

T. A. GARRETT and ELIZABETH GARRETT,
Petitioners,

—v.—

JOHN C. FAUST and CORA FAUST,
Respondents.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

The Judgment of the Court of Appeals is a Re-Examination of the Verdict of the Jury and Therefore Forbidden by the Seventh Amendment

The opinion of the Court of Appeals for the Third Circuit in this suit is to be found in the Proceedings in the United States Court of Appeals for the Third Circuit on pages . It is also reported in Volume 183 F. 2d at page 625. Petitioners filed a motion for rehearing. However this was denied by the Court of Appeals on September 14, 1950, without an opinion.

The judgment of the Court of Appeals dated August 1, 1950

> "On consideration whereof it is now here ordered and adjudged by this court that the judgment of the

> said District Court in favor of the plaintiff be and the same is hereby vacated, with costs * * * "

is void because it is a mere "re-examination of the verdict of the jury" in the District Court and therefore forbidden by the Seventh Amendment of the Constitution.

The following are syllabi taken from the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 1913.

Mr. Justice Van Deventer:

> "The Constitution as originally adopted conferred upon this court appellate jurisdiction both as to law and fact subject to exceptions and regulations prescribed by Congress; but this, as well as the jurisdiction of the other Federal courts, was subsequently restricted by the Seventh Amendment so far as actions at law are concerned."
>
> "The power of a Federal court to re-examine issue of fact tried by a jury must under the Seventh Amendment be tested by the rules of common law."
>
> "Under the rules of the common law an appellate court may set aside a verdict for error of law in the proceedings and order a new trial *but it may not itself determine the issue of fact.*
>
> "Under the rules of common law when the court sets aside a verdict there arises the same right of trial by jury as in the first instance."
>
> "Whether the facts are difficult or easy of ascertainment is immaterial, the guaranty of the Seventh Amendment operates to require the issues to be settled by the verdict of a jury unless the right thereto be waived."

"The terms of the Seventh Amendment and the circumstances of its adoption show that one of its purposes was to require *adherence* to the rule of the common law that a verdict cannot be disturbed for an error of law occurring on the trial without awarding a new trial."

"The right to a new trial on the vacation of a favorable verdict in a case of this nature is a matter of substance and not of form."

Justice Van Deventer:

This was an action in the Circuit Court of the Western District of Pennsylvania on an insurance policy. The case was tried before a jury which brought in a verdict for the plaintiff of $18,224.02. The insurance company moved for judgment in its favor on the evidence notwithstanding the verdict, but the motion was denied. The Company excepted and judgment was entered for plaintiff. The case was taken on writ of error to the Circuit Court of Appeals. That court reversed the judgment with a direction to sustain the latter motion on the ground that the evidence did not legally admit of the conclusion that the policy was a subsisting contract of insurance at the date of the death of the insured. 177 Fed. Rep. 842.

"A writ of certiorari then brought the case here."

"The real question is, whether in the directives given by the Circuit Court of Appeals there was an *infraction* of the Seventh Amendment of the Constitution of the United States which declares:

'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.'

* * * * *

"It will be perceived, therefore, that the Court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings.

* * * * *

"The Constitution of the United States, as originally adopted, conferred upon this court, by Article III, Sect. 2, 'Appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.' but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law and *evoked so much criticism* on that ground that the first Congress proposed to the legislatures of the several states the Seventh Amendment, which was promptly ratified. 1 Stat. 21, 97; Story on the Constitution, sections 1763, 1768.

'The adjudged cases dealing with the origin, scope and effect of the amendment are numerous and so comprehensive that little room for original discussions remains.

'In United States v. Wonson, 1 Gall. 5, 20; 28 Fed. Cas. 745, 750, a case decided in 1812 and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the amendment: 'Beyond all question, the common law here alluded

to is not the common law of any individual state, (for it probably differs in all), but it is the Common law of England, the grand reservoir of all our jurisdiction * * * Now according to the rules of the common law the facts *once tried by a jury are never* re-examined, unless a new trial is granted in discretion of the court, before which the suit is pending, for *good cause shown*; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de nova is awarded. This is the invariable usage settled by the decisions of ages'.

"In Parsons v. Bedford, 3 Pet. 433, decided in 1830, the same learned justice, speaking for this court said (p. 446):

'*The trial by jury is justly dear to the American people.* It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy * * * One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a *fundamental* guarantee of the rights and liberties of the people.' And then coming to the clause, 'and *no fact tried by a jury shall be* re-examined in any court of the United States, than according to the rules of the common law', he continued (pp. 447, 448): 'This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to

the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de nova, by an appellate court, for some error of law which intervened in the proceedings'.

* * * * *

instead of ordering a new trial, as was required at common law, the Circuit Court of Appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This we hold could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly *forbids* that issues of fact be settled by such a trial shall be examined otherwise than, according to the rules of the common law."

* * * * *

"The judgment of the Circuit Court of Appeals is accordingly modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial."

On the question of substance, this case at bar is a duplicate of the foregoing action.

Glynn v. *Krippner, et al.,* 60 Fed. 2d 406.

The plaintiff brought suit in the Federal Court against the defendants to recover damages for personal injuries resulting from a collision at a highway intersection between a truck plaintiff was driving and an automobile driven by one of the defendants. Case was tried by a jury

which awarded the plaintiff a judgment in the sum of $1,600. damages.

The defendant then made a motion for judgment setting aside the verdict of the jury. The judge said that the plaintiff was guilty of negligence and set the judgment aside as a matter of law.

Plaintiff took an appeal to the Circuit Court of Appeals and that court said that by virtue of the Seventh Amendment, the District Court did not have the power to strike out that judgment. The Court of Appeals reversed the judgment of the District Judge. The judgment was reversed and the case remanded with instructions to enter judgment in accordance with the verdict.

> "A United States Court of Appeals has no jurisdiction to re-examine facts tried by a jury. Parsons v. Bedford, La. 1830, 3 Pet. 433, 7 L. ed. 732. See also Williamson v. Osenton, C. C. A. W. Va. 1915, 220 F. 653; U. S. v. Haynes, D. C. Mass. 1887, 29 F. 691."
>
> Amend. 7, Const. of U. S. Amend. 1 to 13 U. C. L. A.

Petitioners' Action Is a "Suit at Common Law Where the Value in Controversy Exceeds Twenty Dollars"

> *Ettleson* v. *Metropolitan Life Insurance Co.*, C. C. A. N. J. 1943, 137 Fed. 62, Cert. denied 64 S. Ct. 92, 320 U. S. 777, 88 L. Ed. 467.

"We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud, whether consisting of conscious or innocent mis-statement or non disclosure,

has been tried by a jury in an action at law on the policy.

* * * * *

"Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be *included in the term fraud,* whether 'legal' or equitable. The issue on such a defense was tried by a jury to the present rules; it continues to be so triable since.

The order of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion."

Moore's Fed. Proc., Vol. III, p. 3010.

"In General.

In a great many cases no problem can arise. Actions which at common law would fall within well-recognized forms of action, and which are not complicated by equitable defenses are jury actions if demand for jury is made. A residual type embracing such actions as negligence, damages for violations of a statute, such as the anti-trust acts, damages for nuisance, fraud and deceit, slander, libel, malicious prosecution; trover, for conversion of personal property; detinue and replevin, for wrongful detention of personal property; ejectment—to recover possession of land; covenant—to recover on a sealed instrument; det; general assumpsit; and special assumpsit—to recover damages on a simple contract.

"Statutory Right.

A valid statute of the United States can enlarge the constitutional right to jury trial. Citing Footnote 3008:

Anti-trust laws. Suits thereunder for damages. Fleitmann v. Welsbach Street Lighting Co. (1916) 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505 (treble damages).

Fraud Presents a Jury Issue

"Fraud, especially fraud in the procurement of a release, is ordinarily a question of fact for the jury."

Barron and Holtzoff, Fed. Prac. and Proc., Vol. 2, p. 579, citing *Chesapeake & Ohio R. Co.* v. *Howard,* 1900, 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015;

Brown v. *Pennsylvania R. Co.,* C. C. A. 2d 1947, 158 F. 2d 795 and cases. See also Fed. Digest, Sec. 58 (1-6).

Under the Seventh Amendment in a Federal Case, Directing a Verdict for Defendant Where There Is Any Substantial Evidence Against Him, Is Error

"Where there was evidence supporting plaintiff's theory, direction of verdict for defendant was unauthorized and constituted denial of 'trial by jury'. Howard v. Louisiana & A. R. Co., C. C. A. La. 1931, 49 F. 2d 571."

Amendment 7 U. C. L. A. Amend. 1 to 13.

"Under the Seventh Amendment to the Constitution, a jury trial is guaranteed in a civil action; and it is error to direct a verdict for defendant if there is any substantial evidence which is stare decisis."

U. S. v. *Lesher,* C. C. A. Or. 1932, 59 F. 2d 53.

"It (Seventh Amendment) was adopted in 1791. It preserves the right to trial in the nisi prius court, and, where jury is had, precludes an appellate court from a re-examination of the evidence, except to the extent of determining whether there is any substantial evidence in support of the verdict."

3 Moore's Fed. Prac. p. 3008.

Mr. Justice Lamar, in the case of *Aetna Life Ins. Co.* v. *Ward,* 140 U. S. 76, says:

"It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admissions or rejection of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the Court and its refusals to charge. *We have no concern* with questions of fact, or weight to be given to the evidence which was properly admitted. Minor v. Tillotson, 2 How. 392, 393; Zellers' Lease. Eckert 4 How. 289; Dirst v. Morris, 14 Wall. 484, 490; Prentiss & Zane, 8 How. 470, 485; Wilson v. Everett, 139 U. S. 616."

This case is cited very often.

The Record Is Barren of Any Evidence That the Garretts Knew That They Were Being Double-Crossed

The Garretts did not know that they were being double-crossed on February 21, 1946 when Mr. Faust sent the telegram and letter stopping their shipment of turkey

eggs. That is, they did not know at that time that the Fausts were buying turkey eggs by the thousands from Oklahoma, Missouri, Oregon, Virginia, and other states. That information did not come to them until after suit was commenced nearly a year thereafter when by order of the Court counsel for plaintiffs inspected and photostated all of the books of account of the defendants, the originals of which were introduced in evidence and are part of the record in this action (Exhibits 9, 10, and 11), except as to what Mr. Garrett saw at the depot at Ephrata on or about April 3, 1946.

The Court of Appeals Erred in Taking into Consideration Only the Losses and Not the Income

All that the Court of Appeals mentioned in its opinion was the number of cancellations. It gave no figures whatsoever as to the gross income of the Ephrata Hatchery. Would the tax collector be satisfied with a mere statement of losses? The original books show that the number of eggs which the Fausts purchased during the turkey year of 1945-'46 was 783,162. The number of poults sold was 411,152. The respondents' gross income from the sale of poults that year was $287,806.40. The average price of poults for 1945 and '46 was 70¢, 10¢ more than the limit set before the price of eggs could be changed. Should not the Court have taken this gross income into consideration? Was not the jury justified in its verdict?

The fact of it is the Fausts were not justified in cutting the price of eggs in December and January. In the letter contract of August 30, 1945 there is the following provision:

"There will be no change in the price of eggs unless we are compelled to sell our poults for less than 60¢".

The average price at which the Fausts sold their poults was 70¢ each for the season. There is nothing there to warrant a cut in prices.

The provision states further "or any condition beyond our control". With the large amount of money received from the sale of poults, as shown by the books and with the business curve for the turkey year a normal one, no conditions beyond the control of the Fausts existed which justified any change in prices or any cancellation of the contract.

Acquiescence Without Knowledge Will Not Bring About the Cancellation of a Contract

There is no evidence in the record showing that the Garretts consented to the cancellation of the contract after they learned that Faust took on the buying of eggs from a great many sellers in various states as herein described.

"Acquiescence is knowledge without objection. Indiana Harbor Belt R. Co. v. Jones, 41 N. E. 2d 361, 363, 220 Ind. 139."

1 Words and Phrases, 1950 Ann. Pk. Part 164, Per. Ed.

"In equity, in order for acquiescence to operate as a bar to complainants' action, knowledge of acts complained of is necessary. Frank v. Wilson & Co., Del. Ch. 9A 2nd 82, 86, 70, 88."

1 Words and Phrases, 1950, Per. Ed. Pk. Part 164, 165.

"Before there can be 'acquiescence' in conditions there must be knowledge of those conditions for acquiescence imports tacit consent, concurrence, acceptance or assent, and acquiescence must be in those conditions that exist during the period in which it is claimed to have occurred. Natural Soda Products Co. v. City of Los Angeles, Cal. App. 132 Pac., 2nd 533, 563, subsequent opinion, 143 P 2d 12."

1 Words & Phrases, Per. Ed. 1950 Pkt, 184, 187.

"A mistake in a note for which another signer was responsible cannot be held to have been acquiesced in by the signer merely signing, she being in ignorance of the fact, for '*acquiescence*' implies a *knowledge* of such facts. Union Central Life Ins. Co. v. Caldwell, 58 S. W. 355, 360, 68 Ark. 505."

1 Words & Phrases (Per. Ed.) 637.

The decision of the Court of Appeals to the effect that Garrett, who was without knowledge of the true facts, as has already been shown herein, acquiesced in the cancellation of the contract is in direct conflict with the decisions of the courts of Texas and Pennsylvania and probably of the courts of all the other states.

The Opinion of the Court of Appeals Is In Direct Conflict With the Following Cases

"In some cases, it has been broadly held that the defrauded party is not under an obligation to use diligence or ordinary prudence to discover the falsity of representations, and that the question on which liability turns is not whether a person of ordinary

prudence would have been deceived, but whether plaintiff was deceived. Indeed, as appears in infra subdivisions of this section, it has been broadly held that the fraud-feasor may not excuse this wrongful conduct by claiming that the defrauded party was unduly credulous or contributorily negligent in relying on the representation."

37 C. J. S. p. 273, citing in the footnotes;

Pa.—Emery v. *Third Nat. Bank,* 171A, 881, 882, 314 Pa. 544, quoting *Tex. Corpus Juris—El Paso Products Co.* v. *Alsup,* Civ. App. 37 S. W. ed. 1116—*Commercial Bank & Trust Co.* v. *Buntain,* Civ. App. 278 S. W. 503—*Hull—Tex. Oil Assn.* v. *Pikes,* Civ. App. 240 S. W. 994;

Graves v. *Haynes,* 231 S. W. 383, 385 Commission of Appeals of Texas.

"Defendant in error was under no duty to investigate the truth or falsity of such representations. The Supreme Court, in Labbe v. Corbett, 69 Tex. 503, 509, 6 S. W. 808, 811, lays down the rule in the following quotation from another authority:

'When once it is established that there has been any fraudulent misrepresentation, * * * by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by further inquiry. He has a right to retort upon his objector: "You, at least, who have stated what is untrue, * * * for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly upon your fairness and honesty." ' "

The Burden of Proof Is On the Defendants, the Fausts

Throughout the entire opinion the Court of Appeals has assumed that the burden of proof is on the plaintiffs. This is error. The Court of Appeals, in its opinion, says:

> "The evidence wholly fails to establish either fraudulent misrepresentation by the defendants or a breach of contract by them." p. 7.

For discussion see page 23 of Motion for Rehearing.

CONCLUSION

The verdict of the jury in the sum of $17,000. has the full protection of the Seventh Amendment and is therefore still in full force.

A jury trial was demanded. A verdict of $17,000.00 for the plaintiffs was brought in by the jury. A judgment on the verdict was entered on the record on November 7, 1949. The action was a common law suit. The verdict was for more than $20. The evidence introduced to support the verdict of the jury was substantial, and highly convincing, much of it being defendants' books of account which directly and completely contradicted the letters and telegram of the Fausts. Defendants failed to take the witness stand to testify in their own behalf or deny or corroborate their books of account. The defendants made a motion for a new trial which the Honorable Judge McGranery denied.

Thus there was presented in the District Court in the case at bar substantial evidence in support of the verdict of the jury and a number of substantial questions of fact.

Is it not plain that we have here a case of a jury verdict coming within the full protection of the Seventh Amendment of the Constitution:

A Court Action Forbidden by the United States Constitution Is Void and Not Voidable

The judgment and opinion of the Court of Appeals, insofar as it pertains to the following

> "On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in favor of the plaintiff be and the same is hereby vacated, with costs"

is void and not voidable.

A void act is one that never went into effect. A void contract is one that never had a beginning. No one is bound by it. No court judgment is valid if forbidden by statute. It never came into existence and binds no one.

> "Plural marriages being prohibited by the Constitution are void ab initio. Whitney v. Whitney, 134 P. 2d 357, 359, 192 Okl. 174".
>
> 44 Words & Phrases, Per. Ed. 1950, Cum. Pkt., p. 67.

> "A thing is void, which is done against the law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it, himself after it is done."

Martius v. *Cowles,* 18 North Carolina 28, 32.

"A contract void ab initio is one that never went into effect. In re Miller's & Manufacturers' Insurance Co., 106 N. W. 485, 493, 97 Minn. 98."

44 Words & Phrases, Per. Ed. 343.

"A void thing is no thing: it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed. Mobile County v. Williams, 61 So. 963, 180 Ala. 639."

44 Words & Phrases, Per. Ed. 319.

"Void as used in constitutional provision that all pretended sales of homestead involving any condition of defeasance shall be void, means of no legal force or effect (Const. Art. 16 Sect. 50, Wilson v. Alexander (Tex.) 50 S. W. (2d) 440, 442.)"

44 Words & Phrases, Per. Ed. 319.

"Voidable" Defined

"Things are voidable which are valid and effectual until they are voided by some act. Toy v. Hopkins, 29 S. Ct. 416, 417, 212 U. S. 542, 53 L. Ed. 644, quoting and adopting the definition in 8 Bac. Ar."

44 Words & Phrases, Per. Ed. 443.

The Seventh Amendment uses positive language when it says "and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." That is one of the greatest guarantees of liberty in our Constitution. Its

MAR 30 1951

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 450

T. A. GARRETT AND ELIZABETH GARRETT,
PETITIONERS,

versus

JOHN C. FAUST AND CORA FAUST,
RESPONDENTS.

MOTION FOR REHEARING

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LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

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INTRODUCTORY STATEMENT

It is apparent that the Court of Appeals believed the statement pertaining to cancellation of poult orders made by the Fausts' counsel in his address to the jury in the United States District Court. But the Fausts' own books of account prove the above statements to be indisputably false. Therefore the Court of Appeals never had the power to re-examine the verdict of the jury.

The following are syllabi taken from the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 1913.

"Mr. Justice Van Deventer:

"The power of a Federal court to re-examine issue of fact tried by a jury must under the Seventh Amendment be tested by the rules of common law."

"Under the rules of the common law an appellate court may set aside a verdict for error of law in the proceedings and order a new trial *but it may not itself determine the issue of fact.*"

See the many cases to that effect in the petition for certiorari and supporting brief.

The following was taken from the jury address of Mr. O'Brien, attorney for the defendants. See pages 255a, 256a.

> " * * * on February 21, Mr. Faust, or the Ephrata Hatcheries sent a telegram to all of the *Texas turkey flocks*, that is, all suppliers, not *Garretts*, but to *everybody*, and the telegram is in evidence, and you will read it, it is dated February 21, in which he says: 'Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. Stop all egg shipments at once.'"
>
> " * * * If you please, these are two order books of the Ephrata Hatcheries. They contain *all* of the orders for poults, not turkey eggs, for poults * * * "
>
> " * * * you will find out that when Mr. Faust on behalf of Ephrata Hatcheries sent the telegram of February 21 he had received, as shown by these books, cancellations for 107,134. Cancellations for 107,134 poults *up until February* * * * So that there was *no misrepresentation* when this telegram was sent, it was the truth * * * "

But, as will be shown, it was not the truth.

Faust's February 21st telegram to all the Texas "turkey flock" could mean only one thing to the plaintiffs—that the Fausts were in a very serious financial situation verging on bankruptcy, which was not true. The Fausts' books of account, Exhibits 9, 10, and 11, which were offered in evidence and which were referred to by Mr. O'Brien in his argument tell a very different story. Exhibit 9 gives the list of all the egg sellers, number of eggs purchased by Faust (783,162) and date when purchased—during the turkey year 1945-'46, not only those purchased from the Garretts but from every single seller of eggs to the Fausts for that turkey year. Exhibits 10 and 11 are two books of account in which the Fausts kept complete accounts of the poult sales. Mr. O'Brien, the Fausts' attorney, did not object to the introduction of plaintiffs' Exhibits 9, 10, and 11, the Fausts' only account books for the 1945-'46 turkey season. 67a-73a.

The plaintiffs, before the case was tried, filed a motion requiring the Fausts to produce for inspection, copying, or photostating all of their books of account for the 1945-'46 turkey season covering as Fausts say, December, 1945 to July 1, 1946. The motion was granted by the United States District Court judge. Counsel for plaintiffs made the inspection and decided to have said record photostated at Lancaster, Pennsylvania.

Mr. O'Brien, in his address to the jury, 225a, said:

> " * * * If you please, there are two order books of the Ephrata Hatcheries. They contain all of the orders for poults, not turkey eggs, for poults, and if you will take time you will see it is written in lead pencil in an informal way on page after page; Cancelled, cancelled, cancelled.
>
> In other words, on February 21, if you have the time, and the industry, and the willingness, if you

> count up all those cancellations of poults, *as I have*, you will find out that when Mr. Faust on behalf of Ephrata Hatcheries sent the telegram of February 21 he had received, as shown by these books, cancellations for 107,134 poults." However the books do not show that.

In the foregoing Mr. O'Brien, counsel for defendants, says that the Ephrata Hatcheries books of account are accurate and reliable. He specifically told the jury that the "two order books of the Ephrata Hatcheries * * * contain *all the orders for poults*, not turkey eggs, for poults". The order books to which he refers show only 2,460 poults cancelled. However Mr. O'Brien told the jury that there were 107,134 poults cancelled, as he put it in one sentence, before February and in a later sentence before February 21st. The actual number of poults *sold* by the Fausts from the beginning of the season until February 21, as recorded in the book of account to which Mr. O'Brien refers, was 35,323 and, as the book also shows, only 2,460 poults were *cancelled* during that period. With O'Brien vouching for the accuracy of the books of account and all three of the original books having been admitted in evidence without any objection on the part of the defense attorney; with the record of the poult sales between the beginning of the season up to February 21 covering only 13 pages, no page containing more than 5 sales; with the total number of poult sales being only 57, not counting cancellations of which there were five up to February 21, 1946, Mr. O'Brien would have the Court believe that there were 107,134 poults cancelled! Did not Fausts' books of account impose a definite duty upon the jury to disregard entirely his statement that there were 107,134 poults cancelled? There was no alternative and the jury rendered its verdict accordingly.

Where, as in this case, the attorney for the defendants admits the accuracy of the books of account in addressing the jury and in the presence of the defendants, the jury, of course, has no alternative but to follow those books of account and give its judgment in favor of the plaintiffs. That presents no question of law but only one of facts. Thus the Court of Appeals never acquired jurisdiction to re-examine the verdict of the jury in this case.

LIST OF ALL CANCELLATIONS OF POULT ORDERS DURING DECEMBER, 1945, JANUARY AND FEBRUARY TO THE 21ST, 1946, AS RECORDED IN THE FAUSTS' BOOKS OF ACCOUNT, EXHIBITS 10 & 11.

Note:—The word "Out" is to be found in every sale of a group of poults. That means that a sale has been made and the poults shipped to the purchaser. "Out" does not mean cancelled.

DECEMBER		No. of Cancellations
DATE		
Dec. 17	One cancellation on the first page of Exhibit 10. (Page numbers in defendants' books of account, Exhibits 10 and 11, are either in the upper right or left corner.) Purchaser kept a part and cancelled the balance. The following is an exact copy of this order:—	
	"2698. Edward Wulff. R. #1 Ellicottville, N. Y. Cattaraugus Co.	
	100 Narrangansetts $ 70.00	
	50 Our Choice 30.00	
	$100.00	
	Refunded $40.00 12/17/45 40.00	
	$ 60.00"	

	No. of Cancellations
"Cancelled" was written in pencil in large script across the whole order. The word "Refunded" and the amount and date were written in pen in different handwriting. Apparently that notation was made by a different person after the order was taken. It is also apparent that the order was not completely cancelled. The total number ordered was 150 poults. The Fausts kept $60 of the amount paid in. The cancellation in this case does not cover the whole order of 150 because the poults sold by Faust were different breeds at a different price. Probably not more than a third of the order was cancelled or about 50 poults.....	50
JANUARY	
No cancellations	-0-

It will be noticed that in his address to the jury Mr. O'Brien says that there were cancellations of 107,134 poults before February, 1946—quite a contrast between his figures and those of the Fausts in their books of account—only 50 poults cancelled before February 1. In the same address Mr. O'Brien later says that there were 107,134 poults ordered cancelled before February 21, the date of the telegram of Faust which said:

> "Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. *Stop all egg shipments at once.*"

FEBRUARY

DATE		No. of Cancellations
Feb. 4	First poult order in February marked "Cancelled" is in fact not a cancellation (page 7, Exhibit 10). This was first penciled as a cancellation and then below in same handwriting is written "Will take after phone conversation". Then underlined is the word "Deliver" with no mention of a refund of the $1750.00 for the 2500 poults marked "Paid". This was headed "Forest Hall Farms" and dated February 4. As you can see, this is not a bona fide cancellation	-0-
" "	Cancellation of 35 poults with all the money refunded	35
" "	Cancellation of 125 pounts, the money being refunded	125
" "	(Page 11) cancelled sale of 1500 poults purchased by Howard Martin. The following is a copy:— "2675 Howard Martin R #2 Lancaster, Pa. 1500 B. B. B. $1125.00 Cancelled Will Call (Pk Millersville 4976)"	
" 18	(Page 13) Exact copy of the same order with the same number— 2675. It is petitioners' judgment that these two orders are one and the same, the latter being merely a repetition of the first.....	1500

DATE		No. of Cancellations
Feb. 18	Order marked "Cancelled" of 750 poults with the notation "See order Blank" underneath.....	750
	Total February Cancellations....	2410
	Total cancellations for December & January	50
	Total cancellations for December, January & to Feb. 21....	2460

An examination of respondents' Exhibit 9 shows that Fausts' first principal sources of eggs were the Texas turkey egg producers. This is evidenced by the fact that on each page of that exhibit there were usually two and sometimes three accounts. With no exceptions, where there were more than one, the first would be that of a Texas egg seller. The dates are given and these also show that Texans were the first sellers of eggs to Ephrata Hatcheries. During the 1945-'46 turkey egg season there were 16 states represented by turkey egg sellers. Of these 54 were from Texas and 14 from other states. As in every business, there were slight variations of prices during the year. A one cent turkey egg price drop on 100,000 eggs means a profit to the buyer of $1000.00 if he is not bound by season contracts like the Garretts and the rest of the "Texas Turkey Flock".

The total number of eggs purchased by Faust before February 21, 1946 was 309,590 and the total number purchased by him after February 21 to the end of the season was 473,572, totaling 783,162 for the season. The average price which the Fausts received for poults was 70¢, 10¢ above the minimum price put into the letter contract by Faust himself for the season. The gross income, as the books of account show, was $287,806.40 for the year. The

Faust's telegram, in its wording, was a command to "stop all egg shipments at once". It was sent ostensibly to all shippers but in fact only to the Texas sellers to whom Faust had given whole season price contracts. Faust used this telegram scare to make the Texans acquiesce in the cancellation of their contracts. Thus there was no issue of law before the Court of Appeals. The issue of fact had been decided by the jury.

production curve for a seasonable business being transacted in a part of the year. Certainly, if there had been a financial crisis such as Faust and his lawyer and the Court of Appeals have pictured it would be reflected in that production. Also the fact that the prices for poults averaged 70¢, 10¢ above the figures in Faust's letter contract accepted by the Garretts, is clear proof that there was no financial crisis which Faust was obliged to bridge over. Is it not true that the very first factor which an appraiser wants to see and examine is the income as shown in the books of account from month to month? Merely looking at the cancellation losses and ignoring the season's over all profits would not satisfy such an appraiser, as apparently it did the Court of Appeals in the case at bar.

An examination of Exhibit 9, Faust's own book of account, shows that between February 10 and March 1, 1946 Faust purchased 132,670 eggs and on February 20 and 21, the two days when he was preparing and sending out telegrams and letters to Garrett and the Texas producers, telling them to stop egg shipments at once he bought 24,824 eggs. At no time did Faust decrease the daily buying of eggs after February 21. Faust's book of account, Exhibit 9, says that he purchased 309,590 eggs before February 1, 1946, and from February 21 to the end of the season he bought 473,572, 163,982 more after February 21 than before. Thus even though the number of eggs sold by the Texas producers after February 21 was greatly reduced, nevertheless, the purchase of eggs by Faust was greatly increased. This was brought about by a tremendous increase in the months nearest February 21—

number of poults sold by the Fausts during the year was 411,152.

On page 8 in Appellees' Motion for Rehearing in the Court of Appeals is to be found a list of the poults sold by the Fausts in the 1945-46 season. It shows a perfect production curve for a seasonable business being transacted in a part of the year. Certainly, if there had been a financial crisis such as Faust and his lawyer and the Court of Appeals have pictured it would be reflected in that production. Also the fact that the prices for poults averaged 70¢, 10¢ above the figures in Faust's letter contract accepted by the Garretts, is clear proof that there was no financial crisis which Faust was obliged to bridge over. Is it not true that the very first factor which an appraiser wants to see and examine is the income as shown in the books of account from month to month? Merely looking at the cancellation losses and ignoring the season's over all profits would not satisfy such an appraiser, as apparently it did the Court of Appeals in the case at bar.

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March, April, and May. This is also evidenced by the great increase in the sale of poults by the Fausts in those three months. That means that it was necessary to buy more eggs.

Faust's books of account, Exhibits 10 and 11, show the following poult sales for the five months beginning with February: February—23,505, March—65,711, April —131,771, May—103,833, and June—46,295, or a total of 370,115. Faust sold these at an average price of 70¢ per poult, bringing in a gross income for those five months of $259,080.50.

Mr. O'Brien says these books of account are accurate. At no time have the Fausts dared to say that these figures are mistakes nor did they try to disprove them in the trial of the case or make some excuse for alleged errors. With the jury having no denials before them from the defendants, what was its duty in determining a verdict other than the one it brought in?

Here again, where is there any issue of law which gave the Court of Appeals the right to re-examine the jury's verdict in the face of the 7th Amendment of the Constitution of the United States?

The Court of Appeals, like the defendants and their attorney, did not go any farther into the case than February 21, 1946, the date of Faust's telegram:—"Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. Stop all egg shipments at once." On page 6 of its opinion the Court said:

> "Nor is there any evidence that in December, 1945 and January and February 1946 the prospects of the Ephrata Hatcheries for the sale of poults were not as represented in the statements referred to. On the contrary the defendants' books of account which were offered in evidence by the plaintiffs establish that they had in fact received can-

cellations of orders for thousands of poults during this period."

The three books of account mentioned all are evidence admitted by O'Brien. Yet the Court of Appeals failed completely to pay any attention whatsoever to these books except that they saw some cancellations for the first three months, and assumed that the 107,134 poult cancellations mentioned by O'Brien were figures quoted directly from the books of account.

The record of what took place is on the first 14 pages of Exhibit 10, the first account book registering the sale of poults, and all that happened up to February 21 was on these 14 pages. There were never more than five sales on each page. Petitioners are at a loss to know how the Court of Appeals could make the statement on page 6 of its opinion that "the books of account which were offered in evidence by plaintiffs establish that they had in fact received cancellations of orders for thousands of poults during this period" if, as the Court said, it had "made a careful study of the record", that is, of the first 14 pages in Exhibit 10 which contain that record.

On page 5 of the Court of Appeals opinion there is a quotation from Faust's letter of February 21 to N. B. Garrett, son of T. A. Garrett, petitioner, in which he said "Each day we receive cancellations of poults." This comes within the period prior to February 21. Exhibit 10, Faust's own account book, shows that up to that time there had been only five cancellations. If the Court studied that account book how could it believe the falsehood in the N. B. Garrett letter?

Petitioners also fail to see how the Court could pass upon the financial condition of any company merely by counting its losses. Does that not amount to ignoring the most relevant and material evidence, the equitable assets

of the Garretts shown in the three volumes of account, thus denying the Garretts the due process of law guaranteed to them by the Constitution of the United States?

Mr. O'Brien, in his address to the jury, said "The books of account contain all the orders for poults, not turkey eggs, for poults". The jury, under their oath as jurors, could not bring in any other verdict on the issue of fact than the one they handed down, and which they alone had the power to decide.

The Court of Appeals ignored the fact that the Fausts collected twice for the same broken eggs, once from the Garretts and once from the Railway Express Agency. See Appellees' Motion for Rehearing in the Court of Appeals, pp. 15-18 inclusive.

The Fausts, through their attorney, were guilty of contempt of court when they designedly caused the false statement to be put before the jury in the District Court and before the Court of Appeals "that there were 107,134 cancellations before February 1, 1946" and further said that the February 21st telegram to the Garretts was true when they knew it to be false and failed to make any corrections when the case went up to this Honorable Supreme Court in the Petition for Certiorari.

Thus Contempt of Court has extended within the jurisdiction of this Honorable Court. If the parties who put the false statement of facts into the record did get past the Court of Appeals they are not beyond the bounds of justice.

False facts are untruths. Untruths have no existence and therefore can not be the basis of any legal rights. Thus it follows that the false statement made by O'Brien that there were "cancellations for 107,134 poults up until February" makes the judgment of the Court of Appeals non-existent, void and not voidable.

The opinion of the Court of Appeals is interpenetrated by the Fausts' false claim of cancellations by the thousands

between December 15 and February 21. It bases its decision that there was no misrepresentation on the said thousands of cancellations. The following is a sample of the Court's reasoning, taken from page 6 of its opinion:—

> " * * * Nor is there any evidence that in December 1945 and January and February 1946 the prospects of the Ephrata Hatcheries for the sale of poults were not as represented in the statements referred to. On the contrary the defendants' books of account which were offered in evidence by the plaintiffs establish that they had in fact received cancellations of orders for thousands of poults during this period."

That claim is absolutely disproven by Faust's own books of account vouched for as complete authority by his attorney, Mr. O'Brien. Therefore the decision of the Court of Appeals based upon these false statements is void because the appeal from the District Court to the Court of Appeals presents no issue of law, only an issue of fact which the District Court jury decided and which verdict, protected by the 7th Amendment of the United States Constitution, cannot be re-examined. See the many cases cited in plaintiffs' Petition for Writ of Certiorari.

Inasmuch as the Fausts' defense is based entirely upon facts which they knew to be false and which misled the Court of Appeals they are guilty of contempt of Court. When the real truth is known there was no real controversy because O'Brien says that Exhibit 10 states the truth. The Fausts having created a defense out of false facts first tended "to bring the authority of the courts and the administration of law into disrepute or in some manner impede the due administration of justice" and impaired plaintiffs' "remedies and rights causing actual damages" to plaintiffs with "no remedy prescribed by law for the

recoupment of such damages" if this Honorable Supreme Court does not take jurisdiction. 17 *C. J. S.* 4.

> "Four elements are necessary to hold one guilty of contempt of court in procuring mandates impairing and impeding plaintiff's rights and remedies and causing him actual injury, etc., namely: First, a deceit on the court; second, the plaintiff's remedies and rights were impaired, impeded, or prejudiced; third, that the actual loss, or damages were caused to plaintiffs; and, fourth, that he has no remedy prescribed by law for the recoupment of such damages.—Advance Piece Dye Works v. Zeller, 270 N.Y.S. 487, 150 Misc. 908. 13 C.J. 18, note 50a."

Footnote to 17 *C.J.S.* 4

> "'Obtaining the opinion of the court where no real controversy exists, * * *' citing U.S.—Chamberlain v. Cleveland, Wis. 1 Black 419, 17 L. Ed 93 L. Ed 23, Lord v. Veazle, Me., 8 How., 251 12 L. Ed. 1067."
> 17 *C. J. S.* 12.

The United States District Court jury having found for the plaintiffs on the question of facts involved and there being no question of law, by virtue of the 7th Amendment of the Constitution of the United States, the Court of Appeals had no jurisdiction in this case.

Respectfully submitted,

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I hereby certify that one copy of the foregoing motion for rehearing has been mailed to the attorney for the appellants.

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To:
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CERTIFICATE OF COUNSEL

I, Attorney for the above-named petitioners, do hereby certify that the foregoing motion for rehearing of this cause is presented in good faith and not for delay.

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